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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STEVEN OWEN,

Petitioner,

v.

JUDGE OF THE COUNTY COURT,
SCHENECTADY COUNTY,

and

HON. JOHN B. POERSCH, as District Attorney of Schenectady County,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

PAGE

Table of Authorities i

Opinions Below 2

Jurisdiction 2

Statutes Involved 2

Questions Presented 3

Statement of the Case 3

Reasons Why The Writ Should Be Denied 5

1. There is no conflict between the decision below and those of other State's highest courts as to whether there can be retrial of a multicount indictment following the declaration of mistrial and pursuant to which the first jury was not polled on each count before being discharged 5

2. The case below so turns on its own facts that any reversal would be particular to such facts alone and would not affect other litigants 8

3. The case below turned upon the construction of a New York State statute, Criminal Procedure Law Section 310.60 (1) (a), and does not directly involve a question of constitutional proportion 9

4. A reversal here would require the establishment of a rigid rule governing declarations of mistrial whenever juries fail to agree 11

5. The Court's holding in *RICHARDSON V. UNITED STATES* is sound and precludes this appeal 12

Conclusion 13

TABLE OF AUTHORITIES

CASES

ALLEN V. UNITED STATES, 164 U.S. 492 8

ARIZONA V. WASHINGTON, 434 U.S. 497 (1978) 6

ASHE V. SWENSON, 397 U.S. 436 (1970) 6

BROWN V. HUGHES, 483 F. Supp. 783 11

CLEMSEN V. MUNICIPAL COURT, 18 Cal. App.3d 492, 96 Cal. Rptr. 126 (Ct. of App., 1971) 7

GORI V. UNITED STATES, 367 U.S. 364 11

ILLINOIS V. SOMERVILLE, 410 U.S. 458 11, 12

PEOPLE V. CARADINE, 235 Cal. App.2d 45, 44 Cal. Rptr. 875 (Ct. of App., 1965) 7

PLUMMER V. ROTHWAX, 63 NY2d 243 (1984) 10

RICHARDSON V. UNITED STATES, 468 U.S. ____, 104 S. Ct. 3081, 82 L. Ed.2d 242 (1984) 12, 13

WADE V. HUNTER, 336 U.S. 684 11

UNITED STATES ex rel. ANTHONY V. SIELAFF, 552 F.2d 588 12

UNITED STATES V. LARRY, 536 F.2d 1149, cert. den. 429 U.S. 984 6

UNITED STATES V. PEREZ, 27 Fed. Cas. 504, Fed. Cas. No. 16,033, Affd. 9 WHEAT (22 U.S.) 579, 6 L. Ed. 165 (1824) 11

UNITED STATES V. PEREZ, 9 WHEAT (22 U.S.) 579 (1824) 12

UNITED STATES V. SEE, 505 F.2d 845, cert. den. 420 U.S. 992 7, 11

UNITED STATES ex rel. WEBB V. COURT OF COMMON PLEAS, 516 F. 2d 1034 (3d Cir. 1975) 11

STATUTES

New York Criminal Procedure Law §310.60(1)(a) 8, 9, 10, 11, 12, 13.

MISCELLANEOUS

1 CRIMINAL JURY INSTRUCTIONS §42.60 8
White, *Supreme Court Review of Agency Decisions*, 26 AD L. Rev. 107 (1974) 13

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STEVEN OWEN,

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v.

JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY,

and

HON. JOHN B. POERSCH, as DISTRICT ATTORNEY of SCHENECTADY COUNTY,

Respondents.

BRIEF OF RESPONDENT HONORABLE JOHN B. POERSCH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent Honorable John B. Poersch, as District Attorney of Schenectady County, New York, respectfully requests that this Court deny the Petition for a writ of certiorari, seeking review of the decision and order ("Remittitur") of the New York State Court of Appeals dated May 28, 1985 and reported at 65 N.Y.2d 658, 491 N.Y.S.2d 611.

OPINIONS BELOW

The Respondent is satisfied with the Petitioner's rendition of the "Opinions Below" with the exception that the subject opinion of the New York State Court of Appeals is correctly cited as reported at 65 N.Y.2d 658, 491 N.Y.S.2d 611.

JURISDICTION

The Respondent is satisfied with the Petitioner's rendition of the basic jurisdictional facts of this case to the extent that the petition is timely. The Respondent submits that no federal question presents itself for review.

STATUTES INVOLVED

This case is directly concerned with a construction of New York State Criminal Procedure Law Section 310.60 subd. 1(a) which provides as follows:

"Section 310.60. DISCHARGE OF JURY BEFORE RENDITION OF VERDICT AND EFFECT THEREOF.

1. A deliberating jury may be discharged by the court without having rendered a verdict only when:

(a) The Jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time;. . ."

QUESTIONS PRESENTED

1. Does the highest state court's construction of a state law regarding the proper exercise of a trial judge's discretion to declare a mistrial for want of jury agreement upon a verdict so directly effect a criminal defendant's assertion of a right to be free of double jeopardy as to raise an important issue for Supreme Court review?

2. Should the Supreme Court establish a rule to impose upon all trial courts a requirement that deadlocked jurors be polled to determine their failure to agree upon any verdict in a multi-count indictment trial before declaring a mistrial, which mistrial is otherwise inoffensive to the criminal defendant's right to be free from double jeopardy, and where the trial record would not warrant such a poll?

STATEMENT OF THE CASE

The Petitioner was brought to trial on an Indictment charging him with Manslaughter in the Second Degree, Criminally Negligent Homicide, Assault in the Second Degree and Assault in the Third Degree on October 16, 1981 before the Honorable George W. Stroebel, Jr., Schenectady County Court Judge. Selection of a jury commenced on October 16, 1981 and ended on October 19, 1981 after an intervening weekend. The case was submitted to the jury on October 30, 1981, on which date jury deliberations began at 3:00 p.m. At 5:00 p.m. the jury returned to the Court and informed the Court that it could not agree. The jury was then given supplemental instructions including an "Allen Charge" and returned to deliberation. At 5:45 p.m. the jury returned to the courtroom and requested that certain portions of the trial testimony be read to them, which portions concerned the substance of testimony and credibility of the prosecution witness, Michael Dougherty, who testified to having observed the petitioner operating the automobile immediately before the accident which resulted in the death to one passenger and serious injury to another. The jury was then sent to dinner and returned to its deliberations at 7:30 p.m. At 8:35 p.m. the requested portions of the trial testimony were read to the jury, the jurors asked additional questions of the Court, which the Court

answered, and the jury again resumed its deliberations. The jury returned to the courtroom at 9:35 p.m. for the reading of additional testimony and returned to deliberation immediately thereafter. At 10:30 p.m. the Court discontinued the deliberations of the jury and sequestered them for the night. On the following morning, October 31, 1981, at 9:30 a.m., the jury again returned to the courtroom seeking additional instruction. Instructions were given after which the jury again returned to deliberation. The jury was then interrupted for corrective instruction and returned to deliberation once more. At 11:20 a.m. the jury returned and the following colloquy ensued:

> THE COURT:. . .Madame Forelady, I have a note from you here which states, "This jury is deadlocked, and we can't come to a conclusion." Do you feel in your own minds that there is any possibility that you can reach a verdict? I want to be sure of that now because if there is a possibility if you think by further deliberations reviewing the evidence and the law and reasoning together that you can come to a verdict I want you to tell me now.
>
> JUROR NO. 5: I don't think things can be reasoned out. It's beyond reasoning.
>
> THE COURT: There are certain measures that are beyond reasoning with?
>
> JUROR NO. 5: Exactly.
>
> JUROR NO. 8: The same way we stood when we walked in at 4:00 o'clock. We stand that way. We have taken everything and dissected it. I think I'm a lawyer now.
>
> THE COURT: Well, if you're positive that there's no possibility of reaching a verdict I'll declare a mistrial. I'll discharge the jury and replace the case on the ready calendar for retrial at the earliest opportunity. All right ladies and gentlemen. Thank you very much for your services, and I thank you on behalf of myself and the County of Schenectady and the parties involved, too. You're discharged, and you may return

> home. Thank you very much. I'll continue the defendant on bail, place the case on the ready calendar for retrial.

After the foregoing, the jury was excused and the proceeding was concluded. Before the jury was discharged, the petitioner voiced no objection or exception to the declaration of mistrial. The jury was not polled and no partial verdict was received.

The matter was moved again for jury trial in January, 1983, at which time the petitioner brought on motions, by Notices of Motion dated February 18, 1983 and February 25, 1983, to dismiss the indictments on the ground that double jeopardy barred any retrial. A hearing on the motions was conducted on May 24, 1983 when the motions were submitted without argument. On January 18, 1984, the motions to dismiss were denied by Hon. George Stroebel, Jr., County Court Judge. Subsequently, the petitioner brought a CPLR Art. 78 proceeding in the Appellate Division, Third Department, by Order to Show Cause dated Appellate Division of the Supreme Court granted the writ by order dated August 27, 1984. The Respondent herein appealed to the New York State Court of Appeals upon the ground that the trial record did not support a finding of an abusive exercise of discretion in the trial judge's declaration of mistrial, as a matter of law. The Court of Appeals agreed, reversing the Appellate Division and vacating the writ of prohibition on the ground that no abuse of discretion was evident in the trial record. Its order ("remittitur") was dated May 28, 1985. This Petition ensues as a result.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THOSE OF OTHER STATE'S HIGHEST COURTS AS TO WHETHER THERE CAN BE RETRIAL OF A MULTI-COUNT INDICTMENT FOLLOWING THE DECLARATION OF MISTRIAL AND PURSUANT TO WHICH THE FIRST JURY WAS NOT POLLED ON EACH COUNT BEFORE BEING DISCHARGED.

The Respondent does not dispute the Petitioner's contentions that, in a criminal case, the prosecution may not relitigate issues of fact decided in the defendant's favor in a previous prosecution (*ASHE V. SWENSON*, 397 U.S. 436 (1970); et al) and that the constitutional provision against placing a criminal defendant twice in jeopardy for the same offense prohibits a second trial following an acquittal (*ARIZONA V. WASHINGTON*, 434 U.S. 497, 503, (1978); et al).

The Respondent does dispute the Petitioner's contention that a policy has arisen in a number of states whereby a jury, apparently deadlocked in its consideration of a multiple count indictment, must be polled to determine whether unanimity of agreement had been achieved regarding any single count. No such policy exists in the federal courts. To the extent the same factual situation, regarding the polling of juries deadlocked in their consideration of multi-count indictments, has arisen in the federal courts, certiorari has been denied. *UNITED STATES V. LARRY*, 536 F.2d 1149, cert. den. 429 U.S. 984. Unquestionably, when there is the possibility that a jury has acquitted on one or more of several counts, the prudent trial practice is to conduct a poll to determine which counts are susceptible of mistrial for want of jury agreement. It is, however, conceivable that trial situations may occur where there is no reasonable likelihood or possibility that jurors considering multiple counts may have agreed to a partial acquittal. In such situations the necessity of a jury poll would not present itself. The Respondent respectfully submits that the policies of all the jurisdictions cited by the Petitioner would encompass such a rationale. When the utility of the poll cannot be established, no purpose is served by polling a jury.

The case at bar is one in which a jury poll was rendered unnecessary by the nature of the deliberations. Throughout their deliberations the jury manifested its position, regarding all the charges of the indictment, to be one by which they were finding it impossible to resolve the simple issue of the credibility of the prosecution's chief eyewitness, Michael Dougherty, who testified that the defendant Petitioner had been the operator of the automobile immediately prior to and during the accident which resulted in death for the young, female passenger. That credibility issue was at the heart of any resolution of the central

and threshold issue in each of the offenses charged in the indictment: was the Petitioner the operator of the automobile at the time of the accident? To the extent the jury was unable to agree on whether or not the Petitioner was the operator of the car, they would necessarily be unable to agree on a verdict in any of the indicted charges. That precise and irreconcilable issue was the reason for the jury deadlock in the trial below. It was made apparent to the trial judge and to the parties by the substance of the testimony the jury asked to have reread during deliberations. It was the reason why the Petitioner, as the defendant, declined to request a poll of the jury after the jury's second announcement of deadlock and the reason the trial judge correctly determined that a poll of the jury was not necessary. (A full analysis of the jury's requests for the rereading of testimony was made a part of the Respondent's appeal to the New York Court of Appeals and, if necessary, will be a part of the Respondent's opposition here, if certiorari is granted).

It is respectfully urged that this Court need not and should not entertain the Petitioner's request that it provide "authoritative direction" as to whether or not a jury *must* be polled on each count of an indictment before a mistrial may be declared. No conflict among state jurisdictions exists as the petitioner suggests. Rather, the law regarding the polling of a deadlocked jury is clear and consistently applied to require a poll only where there is a possibility that the jury affected a partial acquittal. Since there was no reasonable possibility of partial acquittal in the trial below, no conflict exists on this issue between the decision of the New York Court of Appeals below and the policies of other state courts.

Here, the jury was polled generally as to their unanimity of deadlock. Since there was assent regarding deadlock from two jurors, including the forewoman, no dissent from the remaining jurors and nothing in the trial record to indicate even the possibility that a partial verdict had been or could have been reached, then the general questioning of the jury was an acceptable and proprietous alternative to an individual poll. *UNITED STATES V. SEE*, 505 F.2d 845, 852, cert. den. 420 U.S. 992; *CLEMSEN V. MUNICIPAL COURT*, 18 Cal. App. 3d 492, 96 Cal. Rptr. 126, 131-132 (Ct. of App., 1971); *PEOPLE V. CARADINE*, 235 Cal. App. 2d 45, 44 Cal. Rptr. 875, 878 (Ct. of App., 1965).

2. THE CASE BELOW SO TURNS ON ITS OWN FACTS THAT ANY REVERSAL WOULD BE PARTICULAR TO SUCH FACTS ALONE AND WOULD NOT AFFECT OTHER LITIGANTS.

This is a case that turns on its own facts and will not affect other criminal litigants. The trial judge became aware, throughout the course of the jury deliberations and as a result of their requests for the rereading of testimony, that they were deadlocking on a simple fact issue, the identity of the driver of the car, which itself turned upon an assessment of the credibility of the chief prosecution eyewitness, Michael Dougherty, vis-a-vis that of the theory put forth by the defendant. Each testified or presented testimony that the other was the driver. Before a verdict could be reached in any of the charged offenses, a resolution of that credibility issue was necessary. This point was not emphasized, although it was raised, in the People's opposition response to the defendant's petition for a Writ of Prohibition brought in the State's intermediate appellate court, the Appellate Division of the Supreme Court. The judges there based their decision to grant the writ on a strict, and somewhat simplistic construction of New York State Criminal Procedure Law Section 310.60(1)(a) and without the benefit of a careful, precise and emphatic analysis of the trial facts. As a result, the court granting the writ determined that the six hour deliberation period was "per se" inextensive, that the mistrial declared thereupon was without the requisite "manifest necessity" and was an abusive exercise of judicial discretion.

Upon appeal by the People to the New York State Court of Appeals, a close examination was made of the trial record upon which it was argued that, since the jury was apparently deadlocked on a single issue of credibility, six hours of deliberation, during which the jury was sequestered overnight and given an *Allen* charge (*ALLEN V. UNITED STATES*, 164 U.S. 492; 1 CJI 42.60), could not be considered "inextensive" as a matter of law and that it was within the sound exercise of discretion for the judge to declare a mistrial. The Court of Appeals so held, noting that no hard and fast rule regarding the sufficiency of the time taken by a jury in deliberation upon relatively simple issues can be established, but that the particular circumstances of each situation

must be taken into the proper analysis of such questions. The Court also held that a poll of the jurors was unnecessary in that, having received an explicitly negative response from two of the jurors when all were generally questioned and not a word of dissent from the others, the trial judge was justified in concluding that unanimity was unlikely within a reasonable period of extended deliberation.

Any decision from this Court which would work a reversal of that in the New York State Court of Appeals must, necessarily, address the propriety of basing a mistrial declaration in a multi-count indictment trial, in which no individual poll was conducted to determine the occurance of a partial acquittal, upon the import of the jury's requests for reread testimony, i.e. the jury's inability to resolve the credibility based threshold issue in each of the charged offenses: was the Petitioner the operator of the car? The likelihood of a similar situation arising to affect future criminal litigants is so small as to be negligible. Therefore, it is an issue which does not warrant an expenditure of this Court's valuable time and attention.

3. THE CASE BELOW TURNED UPON THE CONSTRUCTION OF A NEW YORK STATE STATUTE, CRIMINAL PROCEDURE LAW SECTION 310.60(1)(a), AND DOES NOT DIRECTLY INVOLVE A QUESTION OF CONSTITUTIONAL PROPORTION.

New York State Criminal Procedure Law Section 310.60 reads as follows:

Section 310.60. DISCHARGE OF JURY BEFORE RENDITION OF VERDICT AND EFFECT THEREOF.

> 1. A deliberating jury may be discharged by the Court without having rendered a verdict only when:
>
> > (a) The jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time; . . .(NEW YORK STATE LAWS 1970, c. 996, Section 1).

Although Section 310.60 was incorporated into New York's Criminal Procedure Law for the purpose of codifying double jeopardy protections, its interpretation is not binding in other jurisdictions. The court below rendered the decision being appealed primarily upon a construction of CPL Section 310.60(1)(a) and not upon any review or interpretation of federal codifications or federal court constructions of constitutional announcements regarding double jeopardy. Neither did it presume to interpret, directly, constitutional provisions against placing one twice in jeopardy for the same offense. The court below relied upon its previous decision in *PLUMMER V. ROTHWAX*, 63 NY2d 243, to hold that these six hours of deliberation could not constitute an "inextensive" period of deliberation per se, but must be considered in conjunction with the relatively simple threshold issue in each of the charged offenses which, itself, constituted an issue upon which a jury could shortly become deadlocked. The court below also held that the trial judge reasonably satisfied himself that agreement among the jurors would be unlikely within a reasonable period of continued deliberation by finding that the judge's general inquiry of the jury regarding their unanimity of deadlock was satisfactory to elicit from them their unequivocal declaration of deadlock. Thusly, the decision of the Court of Appeals directly construed CPL Section 310.60(1)(a) by analyzing the facts in the trial below in the light provided by the prescriptions of CPL Section 310.60 (1)(a) without reference to the implications regarding constitutional proscriptions against double jeopardy. As such, any pronouncement from this Court would, necessarily, effect a further construction of State law.

Although every state appellate court decision indirectly effects litigants' constitutionally based rights, whether they be general rights such as the right to due process or specific rights such as the right to be free of double jeopardy, the Supreme Court's jurisdiction in invoked to consider federal questions of law only where the state court's decision directly involves a litigant's constitutional rights. Here, the decision of the New York State Court of Appeals spoke only of the trial court's adherence to the discretion-guiding dictates of CPL Section 310.60(1)(a) and held only that the trial judge's exercise of discretion to declare a mistrial was in accordance with that

provision and, as a matter of law, not abusive. Since the only issue on appeal has always been the propriety of that exercise of discretion, in light of the prescriptions of CPL Section 310.60(1)(a), the matters of law determined below have always only concerned the construction of CPL Section 310.60 (1)(a) and its application and have never been directly concerned with any federal question.

4. A REVERSAL HERE WOULD REQUIRE THE ESTABLISHMENT OF A RIGID RULE GOVERNING DECLARATIONS OF MISTRIAL WHENEVER JURIES FAIL TO AGREE.

This Court has long held that the particular circumstances of each trial should govern decisions to declare mistrial for a jury's inability to agree upon a verdict. In *UNITED STATES V. PEREZ*, 27 Fed. Cas. 504, Fed. Cas. No. 16,033, affd. 9 WHEAT (22 U.S.) 579, 6 L. Ed. 165, the court stated "(T)his is a plain question of fact for them to decide. There was no intricate question of law in the case. A longer time ought to be afforded to the jury, where a case involved a great number of facts and points of law. It depends more upon the nature of the case than upon any settled rule that could be laid down for the discharge of the jury."

Likewise, this Court has stated that "(T)he guiding principles of the *PEREZ* decision. . .command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula." *WADE V. HUNTER*, 336 U.S. 684, 691; see also *UNITED STATES EX REL. WEBB V. COURT OF COMMON PLEAS*, 516 F.2d 1034; *BROWN V. HUGHES*, 483 F. Supp. 793, 796.

A decision to declare a mistrial is one best left to the discretion of the trial judge as the person most aware of the circumstances of the trial. *UNITED STATES V. SEE*, 505 F.2d 845, cert. den. 420 U.S. 992; *GORI V. UNITED STATES*, 367 U.S. 364, 368; *ILLINOIS V. SOMERVILLE*, 410 U.S. 458, 467.

The Petitioner prays for certiorari by asserting the need for an "authoritative direction" from this Court to the effect that juries *must* be polled on each count of an indictment before a mistrial may be declared. The creation of such a rule would

work a severe restriction of the trial court's necessarily broad discretionary powers. (*ILLINOIS V. SOMERVILLE*, 410 U.S. 458, 462) and would create a significant risk of coerced verdicts thus rendering criminal defendants more susceptible to oppressive process of law. *UNITED STATES EX REL. ANTHONY V. SIELAFF*, 552 F.2d 588, 590-591. The Court is respectfully urged to decline the opportunity to create rigid standards for trial practice where judicial scholarship has consistently deemed such formulae antithetical to the effective, case by case administration of justice.

5. THE COURTS HOLDING IN *RICHARDSON V. UNITED STATES* IS SOUND AND PRECULDES THIS APPEAL.

The Petitioner incorrectly asserts that this Court's holding in *RICHARDSON V. UNITED STATES*, 468 U.S. _____, 104 S. Ct. 3081, 82 L. Ed.2d 242 (1984), would permit a trial judge to terminate a trial at any time prior to the rendering of a jury verdict and for any reason without there then being a double jeopardy bar to reprosecution. On the contrary, *RICHARDSON* holds, merely, that the genuine failure of a jury to reach a verdict manifestly necessitates a mistrial and retrial and is not an event which would terminate jeopardy for the accused. As such, the *RICHARDSON* holding is consistent with the line of respected decisions on the subject of mistrial following the inability of a jury to reach a verdict which extend back over 160 years to *UNITED STATES V. PEREZ*, 9 WHEAT (22 U.S.) 579, in 1824. However, the Petitioner's misinterpretation of *RICHARDSON*, further highlights the fact that the decisions below turned upon a construction of the New York State statute, Criminal Law Section 310.60(1)(a), which would prescribe and delineate the nature of a "genuinely" deadlocked jury. The real issue presented by this case, first with the Petitioner's petition for a writ of prohibition in New York State's intermediate appellate court, the Appellate Division of the Supreme Court, and then again upon the Respondent's appeal of the grant of the writ to New York State Court of Appeals, has always been whether the trial court was abusive of its discretion in finding the trial jury to have become genuinely deadlocked as a premise for its declaration of

mistrial. In that decision and exercise of discretion the trial court was held to a strict adherence to the standard for determining genuine deadlock as it was codified in CPL Section 310.60(1)(a), such that the dispute has always been focused upon a construction of that State law. The parties here have never disagreed as to the constitutional double jeopardy implications of a mistrial declared upon a genuine jury deadlock. Therefore, the holding in *RICHARDSON*, consistent as it is with the long established rule that double jeopardy presents no bar to a retrial after mistrial for a genuine inability to reach a verdict, need not be reconsidered by the Court. The reconsideration of *RICHARDSON*, which the Petitioner proposes, is not a valid reason for granting a writ of certiorari.

CONCLUSION

As has been argued above, the decision of the New York Court of Appeals being appealed focused upon the Petitioner's contention that the trial judge had abused his discretion to declare a mistrial for the jury's inability to agree on a verdict. The court below emphatically disagreed, holding that the resolution of the primary issue, the identity of the driver of the car, which required an evaluation of the credibility of the chief prosecution witness, was not a complex but a relatively simple task upon which a jury could shortly become deadlocked. The court found that the deliberation period of six (6) hours was more than a sufficient deliberation period in such circumstances. Therefore, the court below reasoned, the judge's decision to declare a mistrial was amply and substantially justified as manifestly necessary and was not, as a matter of law, an abusive exercise of discretion. The rationale applied to the review of agency decisions based upon findings of substantial evidence is equally appropriate here. Here, the trial record itself provides substantial support for the court's position such that this case does not merit further review and the appellate function should be considered to have come to an end. WHITE, *SUPREME COURT REVIEW OF AGENCY DECISIONS*, 26 AD. L. Rev. 107, 110 (1974).

Finally, for all the reasons stated above, this case is not one which requires an exercise of the Supreme Court's extraordinary

and discretionary jurisdiction. The petition for a writ of certiorari should be denied since review is unnecessary.

Respectfully submitted,
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